REMARKS

The Examiner has rejected claims 13-15 and 19-24 under 35 U.S.C. §103(a) as being unpatentable over Willemsen (U.S. Patent No. 5,832,687), claims 1-7 and 9-23 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over U.S. Patent No. 6,571,529 and U.S. Patent Application Nos. 10/331,407 and claims 1-4 and 13-16 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over U.S. Patent No. 6,695,544. In response, Applicants respectfully traverse the above-mentioned rejections, requests withdrawal of the final rejection and respectfully request reconsideration by the Examiner in view of the remarks submitted in the Amendment, dated January 3, 2005, and the following additional remarks.

The Examiner has taken official notice in the above mentioned rejections of the following limitations: 1) vegetation seeds in the fill material and 2) a plurality of apertures. The Applicant respectfully traverses the Examiners assertion of official notice to such limitations since the official notice of obviousness of these limitations is not supported by documentary evidence and the technical line of reasoning underlying the decision to take such notice is not capable of instant and unquestionable demonstration as being well known and as to defy dispute.

Official notice unsupported by documentary evidence should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well known and as to defy dispute. Ordinarily, there must be some form of evidence in the record to support an assertion of common knowledge. See In re Ahlert 424 F.2d 1088, 1091, 165 USPQ 418, 420-421 (CCPA 1970); In re Lee, 277 F.3d 1338, 1344-1345, 61 USPQ2d 1430, 1434-1435 (Fed. Cir. 2002); In re Zurko 258 F.3d 1379, 1386, 59 USPQ2d 1693, 1697 (Fed. Cir. 2001). Therefore, it would not be

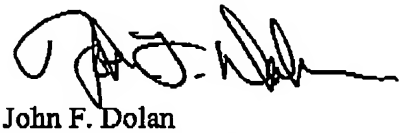
appropriate for the Examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known. See MPEP §2144.03 citing In re Ahlert 424 F.2d at 1091, 165 USPQ at 420-421.

As previously suggested, the Applicant respectfully traverses the Examiners assertions that it would have been obvious to one having ordinary skill in the art of containment or retaining walls at the time of the invention to modify the device shown by Willemsen '687, U.S. Patent No. 6,571,529, U.S. Patent Application No. 10/331,407 (now U.S. Patent No. 6,817,154) and U.S. Patent No. 6,695,544 by including vegetation seeds in the fill material and a plurality of apertures. The Examiner's contention related to the art of "containment" would not support the idea of including a plurality of apertures for growth of vegetation from such apertures, since this would be contrary to containment. Therefore, the Applicants respectfully assert that the facts suggested to be well known by the Examiner's Official Notice are not capable of instant and unquestionable demonstration as being well-known and as to defy dispute. Hence the Applicants request that the finality of the rejection be withdrawn and favorable consideration and prompt allowance of the application be granted.

Finally, the Applicant respectfully requests that the Examiner allow the Applicant an opportunity to further discuss this application before making a decision whether to Appeal or potentially file an Amendment to the claims with or without a Request for Continued Examination (RCE). The Applicants believe that such a discussion would assist in clarifying and potentially resolving the issues presently pending. The Applicants do understand that the prosecution of an application before the Examiner ordinarily is concluded with final action. However, one personal interview by the Applicant may be entertained after such final action if

circumstances warrant. See MPEP §714.12. The Applicants offer that the circumstances warrant an interview and will attempt to contact the Examiner by telephone to discuss this further.

Respectfully submitted,



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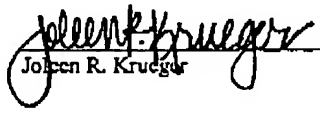

Joleen R. Krueger